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Office-Supreme Court, U.S.
FILED
JAN 12 1959
JAMES R. BROWNING, Clerk

No. 560

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

LEE OLIPHANT ET AL.,

Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN ET AL.,

Respondents

REPLY MEMORANDUM FOR PETITIONERS

JOSEPH L. RAUH, JR.,
JOHN SILARD,
1631 K Street, N. W.
Washington 6, D. C.,
Attorneys for Petitioners.

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REPLY MEMORANDUM FOR PETITIONERS

(i) The "Brief of Respondents in Opposition" does not challenge the basic premise of the Petition for Certiorari that the legality of the exclusion of Negroes from their collective bargaining agent under the Railway Labor Act is an important federal question calling for this Court's review. Nor do respondents attempt in any way to answer petitioners' contention that the holding of the court below disregards the applicable decisions of this Court concerning the private exercise of governmental and governmentally derived responsibilities. Thus, for example, the Court will search the Opposition in vain for any distinction of, or even any reference to, its decision in *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, where this Court ruled unequivocally that "bargaining agents who

enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers." Certainly, as petitioners have repeatedly pointed out throughout this litigation without even an attempted contradiction by respondents in the courts below or in their Opposition here, if a statutory bargaining representative is held to standards of fairness in its action towards those it does not legally represent, it cannot be subject to less stringent standards in its exercise, for those whom it does represent, of the federally-derived statutory power itself.

(ii) Instead of meeting petitioners' assertion that the holding of the court below, which sanctions exclusion of Negroes from their bargaining agent under the Railway Labor Act, raises important federal questions and conflicts with applicable decisions of this Court, the respondents have simply presented argument upon the merits of the case by challenging the *Steele* doctrine. Actually, as this Court is fully aware, the Brotherhood has never accepted, and does not today accept, the *Steele* doctrine as the law of the land. See *Graham* v. *Brotherhood of Locomotive Firemen*, 338 U.S. 232. On page 2 of their Opposition, the respondents state that "the Railway Labor Act has had no more than a metaphysical influence" on collective bargaining and "merely forbids an individual employee or a minority group within a craft from doing something which they never had the power or the desire to do previously" (p. 3). Obviously, if the Railway Labor Act has had no more than a "metaphysical influence", there would have been no warrant for the *Steele* decision holding the collective bargaining agent under the Railway Labor Act to the standards of fair play required of legislative bodies. Similarly, in challenging petitioners' "thumb on the scales" argument (p. 11), respondents would overrule the

entire line of cases in this Court holding private agencies exercising governmentally derived responsibilities to minimum standards of fair conduct. No one suggests that the Brotherhood should be converted "into an agency or department of the Federal Government" (Opposition, p. 11). But, under *Steele, Howard* and other decisions of this Court, there is a sufficient exercise of governmentally derived authority by the Brotherhood to require, at the very least, that it grant Negroes that union membership which is a prerequisite of participation in the selection of their bargaining officials and in the formulation of bargaining objectives.[1]

(iii) Since this case presents to the Court a serious constitutional issue under the Fifth Amendment, petitioners have suggested that the Court may first want to consider an interpretation of the Railway Labor Act which would indicate that Congress had not authorized racial exclusion from the statutory bargaining agent. Respondents seek to ridicule this argument because the Railway Labor Act does not contain language requiring admission of Negroes to membership and because an amendment to accomplish this result failed of enactment (Opposition, p. 12-13). The tenuous nature of interpretation on the basis of the failure of an amendment is well illustrated in this case (see Petition, p. 16). At any rate, whether the issue to be adjudicated is constitutional or one of interpreting the Railway Labor Act can be determined by the Court after it considers the full facts, as it did in *Steele* and similar cases.

(iv) Respondents also dwell at length upon the question whether the Brotherhood discriminates against Negroes

[1] Respondents' suggestion that petitioners are contending that the Brotherhood must "open the doors of membership to all persons within the craft" (p. 5) is totally unwarranted. Petitioners contend only that exclusion cannot be based on racial grounds which this Court found "invidious" in *Steele*.

not only by depriving them of participation in the bargaining process but also by the working conditions actually bargained. Although this was not a necessary part of petitioners' case, petitioners did present to the District Court evidence of continuing discriminations by the Brotherhood in its bargaining of working conditions and in its day-to-day handling of grievances, assignments of jobs and working privileges (see Petition, pp. 5-6). Petitioners' proof of continuing discriminations was accepted by the District Court (J.A. 300) which held that "*there is no question that the evidence presented establishes that fact that these plaintiffs and the members of their class are discriminated against in respect of their representation and participation; their conditions of employment, and other matters relating to such employment.*" It is true that the District Court could not "state definitely" that certain major bargaining changes recently negotiated by the Brotherhood to the disadvantage of Negro firemen were adopted "for the purpose of discrimination" (J.A. 299), and the Court of Appeals agreed. But other discriminations amply documented in the record and accepted by the District Court, do serve to demonstrate the applicability of this Court's statement in *Railway Mail Ass'n* v. *Corsi*, 326 U.S. 88, 94, that denial of "any part in the determination of labor policies to be promoted and adoped in the industry" may deprive racial minorities of "all means of protection from unfair treatment arising out of the fact that the terms imposed by a dominant union apply to all employees . . . "[2] This Court will certainly want to consider that petitioners are not only denied

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[2] Respondents have printed as an appendix to their brief a case in the District Court for the Middle District of Georgia in which members of petitioners' class have sought to prove that they were recently discriminated against in violation of an outstanding injunction resulting from *Steele*, *Tunstall* and *Graham*. What the Brotherhood failed to mention was that this case is presently on appeal to the Fifth Circuit on the ground that the admitted taking of the mileage and pay of the Negro

all voice in the determination of their working conditions by their exclusive statutory representative, but that, without internal political voice and power, they continue to be subjected to discriminatory and self-serving "representation" by the Brotherhood.

Conclusion

We cannot believe that this Court will leave standing a federal appellate ruling that Negro workers can be denied admission to the union which, by virtue of federal law, exclusively represents them in the determination of the most vital aspects of their daily life. Racial denial of voice and vote in the selection of statutory bargaining officials is deprivation of economic democracy no less crying for redress than deprivation of political democracy through racial denial of the right to vote for public officials.

The Opposition having failed in any way to meet petitioners' contentions of importance and conflict with the rulings of this Court, it is respectfully submitted that the Court grant certiorari to determine the vital issues here involved and that it set the case for argument at this term of Court.

Respectfully submitted,

JOSEPH L. RAUH, JR.,
JOHN SILARD,
1631 K Street, N. W.
Washington 6, D. C.
Attorneys for Petitioners.

JANUARY, 1959.

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firemen involved was in fact discriminatory. Actually, what the case demonstrates is the limited value and availability of judicial relief against discrimination which Negro firemen should be able to prevent by the exercise of political power within the union itself.

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No. 360

IN THE

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OCTOBER TERM, 1958

LEE OLIPHANT ET AL.,

Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN ET AL.,

Respondents.

PETITION FOR REHEARING

JOSEPH L. RAUH, JR.
JOHN SHEARD,
Attorneys for Petitioners,
[illegible] K Street, N. W.,
Washington 6, D. C.

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IN THE

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v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN ET AL.,

Respondents

PETITION FOR REHEARING

Petitioners, Negro locomotive firemen, on their own behalf and as representatives of the class of Negro locomotive firemen, respectfully move for a rehearing of the denial of certiorari entered March 9, 1959.

Counsel are not unmindful of the careful consideration which this Court gives to petitions for certiorari and this is no doubt especially true of the instant petition which was *sub judice* for a substantial period of time. But counsel are induced to file this petition for rehearing because the Court's stated reason for denial of certiorari—"the abstract context in which the questions sought to be raised are presented by this record"—indicates both an acceptance by the Court of the importance of the questions

raised and a grave misapprehension by the Court as to the nature of the record presenting those questions.[1]

As we shall demonstrate in Point I of this Petition for Rehearing, the record, far from presenting in an "abstract context" the admittedly important questions concerning racial exclusion from the statutory bargaining agent, actually provides a most concrete, specific and detailed basis for decision in as bitterly contested a litigation as has come before this Court in recent years. *Cf. Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210; *Graham* v. *Brotherhood of Locomotive Firemen and Enginemen*, 338 U.S. 232. Indeed, so concrete, specific and detailed is the record before this Court that the only likely explanation of the Court's use of the words "abstract context" is a misunderstanding of the record created by the confusion in the opinion below. Since the matter was before this Court on petition for certiorari and the Court thus did not have the benefit of briefs and argument on the merits analyzing the record, the Court undoubtedly relied heavily upon the decision below for its understanding of the nature of the record and may well have assumed that the confusion in that opinion reflected a confusion (and thus an "abstract context" for the questions presented) in the record itself. But, as we demonstrate in Point II of this Petition, nothing in the decision below can

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[1] Since this petition for rehearing is predicated primarily upon what we believe to be a misapprehension concerning the record revealed in this Court's announced ground for denying certiorari, this petition is obviously confined to "intervening circumstances of substantial or controlling effect" within the meaning of Rule 58, paragraph 2. The correction of a misapprehension, revealed by the Court in its announced ground for denial of review, has on a number of occasions led this Court on rehearing to grant certiorari previously denied. See, e.g., *Brady* v. *Terminal R.R. Ass'n.*, 302 U.S. 678, 688; *Bakery & Pastry Drivers* v. *Wohl*, 315 U.S. 769, 773; *Cafeteria Employees Union* v. *Angelos*, 319 U.S. 753, 778.

or does impair the concrete context in which the record presents the vital pending questions.

We urge the Court, despite the careful consideration which it has undoubtedly already given to this case, to consider it anew in the light of the analysis of the record and of the opinions below which we present in this petition.[2] This is the last round for petitioners and their class. The Southern railroads have not hired Negro firemen for many years (J.A. 72, 85, 164); and thus the hundreds of Negro firemen involved in this case as petitioners and as a class are elderly men; their overriding wish is to live out their working lives as first class citizens. The reason given by this Court for the denial of certiorari, although it has been widely considered to indicate this Court's doubts concerning the decision below, does not render that decision any less *res judicata* against the class of Negro firemen. *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356.[3] The door to

[2] In the petition for certiorari, petitioners pointed out that "proof that the working conditions bargained are themselves actually discriminatory is not a necessary part of petitioners' case, but petitioners will, if certiorari is granted, demonstrate on this record the extent to which exclusion from the statutory bargaining agent necessarily results in, and did here result in, actual discrimination against them" (Petition, n. 12, p. 13). Since no suggestion had previously been made in this litigation that the statutory and constitutional questions were being presented in an abstract context, there was no occasion to present to this Court in the petition for certiorari an analysis of the state of the record or of the effect of the opinions below on the state of the record.

[3] Since this Court has made it abundantly clear that the denial of certiorari is not in any way to be deemed an approval of the decision below (*United States* v. *Carver*, 260 U.S. 482, 490), there appears to be some justification for the general view that the Court's indication here of a non-jurisdictional reason for its denial of certiorari indicates something more than the ordinary "nonapproval" implicit in an unexplained denial of certiorari. Although this indication of the Court's doubts concerning the decision below may conceivably be of assistance to the many other groups of Negroes barred from their statutory bargaining agent who may at some future time see fit to assert their rights, it will be of no assistance to the expiring group of Negro firemen who have sacrificed so

first class citizenship is closed forever to these men after more than four-years of litigation and of expense and after decades of discrimination constituting one of the darkest chapters in the history of the American labor movement (see, e.g., Northrop, *Organized Labor and the Negro*, pp. 48-71 (1944)). Only one last consideration by this Court can write a just and final chapter to one of the most unjust discriminations of our time.

I

The Record Presents the Issue of Racial Exclusion from the Statutory Bargaining Agent in a Concrete Not an Abstract Context

From the outset of the case, petitioners leveled a two-pronged attack (see J.A. 16-17, 300-301) upon their exclusion from the Brotherhood—first, that their exclusion from membership renders them *inherently unequal* in the statutory bargaining process, and second, that they are entitled to admission because as a matter of fact they are receiving *actually unequal* representation from the Brotherhood. As a concrete foundation and base for the first theory of *inherent inequality*, petitioners sought from the outset to demonstrate how their exclusion from membership results in their complete exclusion from any voice, vote or other participation in the bargaining process. In support of the second theory of *actual discrimination*, petitioners sought from the outset to demonstrate the Brotherhood's hostility, nonrepresentation and misrepresentation, all to provide the most concrete possible context

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much to vindicate their constitutional and statutory rights. Furthermore, as we point out later (see n. 9, p. 20, *infra*), the uncertainty flowing from the Court's use of the words "abstract context" may actually place additional hazards in the way of those seeking to raise issues of racial exclusion and racial segregation, contrary, we believe, to this Court's intention.

in illumination of the very real and immediate need for membership and participation in their statutory bargaining representative.[4]

Petitioners filed a lengthy complaint detailing their complete exclusion from any voice, vote or other participation in the bargaining process and the various types of nonrepresentation and misrepresentation of their interests to which they are subjected by the Brotherhood (J.A. 5-19). Prior to the trial, petitioners obtained various admissions and answers to interrogatories from the Brotherhood, particularly with respect to their exclusion from the Brotherhood, its meetings, its elections, its bargaining deliberations and even its information (J.A. 30-39). At the trial itself, which consumed an entire week in the District Court, eight witnesses appeared for petitioners to testify from personal experience to the hostility, nonrepresentation, misrepresentation and discrimination to which Negro firemen are subjected by their statutory "representative" (J.A. 39-167).

By pleading, interrogatory and proof, petitioners provided a concrete context in the three major areas of disadvantage and discrimination to which they are subjected by virtue of their exclusion from the Brotherhood: (a) denial to Negro firemen of all participation in the statutory bargaining process; (b) misrepresen-

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[4] This two-fold approach of course parallels the two-fold judicial approach in the analogous area of racial segregation in public education. Petitioners' first theory—that racial exclusion from the statutory bargaining representative and the statutory bargaining process is inherently a denial of equal protection and equal representation—is analogous to the grounds for this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483. Petitioners' second theory—that the Brotherhood's consistent and unrelenting discriminations against Negro firemen requires admission to equal political power within the union—is analogous to this Court's pre-*Brown* decisions requiring admission where separate was tangibly unequal. *See Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337; *Sweatt* v. *Painter*, 339 U.S. 629.

tation and nonrepresentation in the day-to-day interests of Negro firemen; and (c) primary disadvantage suffered by Negro firemen under the Brotherhood's current major bargaining objectives. A brief examination of the record on each of these three major areas of disadvantage and discrimination will, we submit, demonstrate that there is nothing in any way abstract in the "context in which the questions sought to be raised are presented by this record."

A. *Denial to Negro Firemen of Participation in the Statutory Bargaining Process*

Petitioners' complete exclusion from the bargaining process and any voice or vote therein was extracted from the Brotherhood in the course of the litigation. The Brotherhood's President admitted on cross-examination (J.A. 218) that Negro firemen are denied any voice or vote in the election of Brotherhood officials responsible for the bargaining and implementation of the working conditions of all firemen. And the Brotherhood was forced to concede, on written interrogatories, (J.A. 32-33), that Negro firemen may not even attend, much less participate in, the meetings where white Brotherhood members are given "reports on negotiations with carriers" and where firemen discuss "matters of general interest to locomotive firemen," including decisions on "time claims and grievance cases," and "impending changes in assignment of runs, the set up of pools, etc." Indeed, even when the Brotherhood conducts votes among firemen on questions of general importance, such as a change in the work week, Negro firemen are denied the ballot (J.A. 125-128).

The question whether exclusion from membership is inherently a denial of equal protection and equal representation under the Constitution and the Railway Labor Act is thus presented to this Court upon a record of carefully

detailed and admitted facts extracted from the Brotherhood in the course of a prolonged litigation. The record is explicit in demonstrating exactly how exclusion from membership results in exclusion from voice, vote and other participation in the statutory bargaining process. We respectfully submit that the care and detail with which the *inherent inequality* of exclusion has been demonstrated on this record is as far removed from an "abstract context" as night from day.

But petitioners did not rest their case merely on the inherent inequality in the denial of voice, vote and other participation with respect to the formulation and implementation of their conditions of employment; they went on to demonstrate the special need for equal political power within the statutory bargaining representative by virtue of the continuing hostility, nonrepresentation, misrepresentation and discrimination to which Negro firemen are subjected by the Brotherhood:

B. *Misrepresentation and Nonrepresentation in the Day-to-day Interests of Negro Firemen*

The record abounds with unrebutted demonstrations of the hostility, nonrepresentation, misrepresentation and discrimination to which the Brotherhood subjects Negro firemen in their most vital interests:

1. Although practically no new Negro firemen have been hired on any railroad since 1941, when the Brotherhood forced the Southeastern Carriers Conference Agreement on the railroads, its officials refuse even to make representations to the railroads to request renewed hiring of Negro firemen (J.A. 72-73, 84-85). As one Brotherhood official informed a fireman who had asked for help to get a Negro relative hired, " there wouldn't be any more Negro

firemen hired, therefore it was just a matter of time we was out" (J.A. 85).[5]

2. The Brotherhood never informs Negro firemen, nor solicits their views, concerning prospective changes in the governing contract or in its implementation and application; petitioners' witnesses, some of whom have been employed as firemen for thirty or forty years, testified that no Brotherhood official has ever solicited their views with respect to their conditions of employment (J.A. 43-44, 57, 71-72, 75, 85-86, 88-89, 99-100, 105, 109, 126, 132, 137, 142-43, 144).

3. Some Brotherhood officials have even openly declared their policy of discriminating against Negro firemen (J.A. 73-75, 84-5, 86-88, 106-109, 306 *et seq.*). One Brotherhood General Chairman, Thad S. Lee, who initiated a strike vote of the white firemen on the Atlantic Coast Line Railroad because of the railroad's violation of a 1925 "gentlemen's agreement" against hiring of Negro firemen (J.A. 309-316), continues as the highest officer of the Brotherhood on the railroad (J.A. 211-15). Another General Chairman, after Federal Judge Mullins entered a decree in 1951 pursuant to the *Steele* doctrine for the protection of Negro firemen, told one of the petitioners: "Judge Mullins gave it to you but I will sure as hell see you don't keep it" (J.A. 75).

4. Although segregated facilities made available by the railroads to Negro firemen are unequal to those afforded

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[5] There could hardly be a less "abstract" need for equal voice within the statutory representative than the very survival of the class of Negro firemen. Yet, since practically no new Negro firemen have been hired on any railroad for many years (J.A. 72, 85, 164), if petitioners cannot by this Court's mandate obtain political power inside the bargaining representative and thereby obtain renewed hiring of Negro firemen, in the foreseeable future there will be no Negro firemen left to be represented by the Brotherhood either as members or non-members.

white firemen, the Brotherhood has not sought to obtain their equalization (J.A. 56, 89, 129-30).

5. Disregarding the seniority rights of Negro firemen, the Brotherhood has given preferential treatment in the assignment of runs, jobs, etc., to junior white firemen over senior Negroes (J.A. 52-53, 86-88, 100-107, 130-132, 140-142, 149-153).

6. The Brotherhood has refused to take up grievances with the railroads on behalf of Negro firemen, or to represent them on an equal basis with their own members in grievance proceedings[6] (J.A. 52-54, 54-55, 102-3, 130-32, 159-61). Indeed, when it was brought to the attention of the Brotherhood's President that its officials were actually requesting fees to represent Negro firemen's grievances, the Brotherhood nevertheless refused to send out instructions for the discontinuance of this discriminatory practice (J.A. 225-226).

What is as significant as this detailed showing of hostility, nonrepresentation and misrepresentation by the Brotherhood is the total absence of any attempt at refutation. *None* of the local Brotherhood officials to whom petitioners' witnesses ascribed hostile and discriminatory conduct were called in rebuttal.[7] Thus, the Court has before it the detailed and unrebutted testimony of eight victims of the Brotherhood's continuing discrimination as a concrete basis for decision of the question whether peti-

[6] Since labor representatives on the National Railroad Adjustment Board, the ultimate statutory arbiter of grievances, are appointed by the Brotherhood (and other unions barring Negroes from membership), Negro firemen are denied any voice in the selection of their representatives on the exclusive statutory forum for the consideration of their employment grievances.

[7] The Brotherhood's case, as presented by three of its highest officials, amounted to no more than a series of self-serving generalizations concerning Brotherhood policies which provided no refutation whatever of the specific testimony concerning specific accounts of discrimination by specified Brotherhood officers (J.A. 168, 243, 271).

tioners' exclusion from membership violates the Constitution and the Railway Labor Act because it results in *actual discrimination* against Negro firemen.

Petitioners might have rested on their showing of inherent inequality (Point IA, *supra*) and of actual day-to-day discrimination (Point IB). But, in an especial effort to give the courts a clear and concrete picture of the impact of exclusion from membership upon Negro firemen, petitioners went even further—they demonstrated that the current major bargaining objectives of the Brotherhood actually work to the primary disadvantage of the Negro firemen, emphasizing the indispensability to their self-protection of the political power that goes with membership:

C. *Primary Disadvantage Suffered by Negro Firemen under the Brotherhood's Current Major Bargaining Objectives*

As important as petitioners' demonstration of day-to-day misrepresentation and nonrepresentation of their interests by the statutory bargaining representative, is petitioners' showing that the Brotherhood is using its broad bargaining power to the *primary disadvantage* of Negro firemen. Petitioners proved at the trial that the Brotherhood has recently bargained and is continuing to bargain "spread the work" modifications in working conditions inuring to the particular disadvantage of the group of *senior* firemen, which necessarily includes most or all the Negroes. In particular petitioners emphasized 1) the reduction, for the benefit of junior firemen, of the monthly mileage made available to senior firemen, 2) the application of a "gouge" rule to take mileage from a high-mileage, senior fireman, for the benefit of junior firemen, 3) the special privileges recently accorded to white engineers "demoted"

to firing, and 4) the bargaining of a compulsory retirement age of seventy with immediate impact on the older, senior firemen (J.A. 42-52, 85-86, 101-105, 120-121, 136-137). Since on all the railroads where Negro firemen are employed they constitute the senior group of firemen (by virtue of denial in the past of opportunity for promotion to engineer and the failure of most railroads to hire any new Negro firemen since 1941), *every one of these major policies of the Brotherhood, designed to reduce working opportunities of senior firemen, operates to the primary disadvantage of the Negroes.* And while there was sharp disagreement between the parties as to whether these major Brotherhood policies are *racially motivated,* there was no conflict whatever concerning the fact that the Negro firemen are primary losers under these current objectives of the Brotherhood. As the Brotherhood conceded in its District Court brief (at p. 23):

> "On those seniority districts on which Negro firemen are employed, the Negroes are usually the oldest firemen and have the greater seniority. Hence, they hold the preferred runs, which is generally tantamount to saying that they hold the jobs on which the largest earnings can be made per month. When the mileage limitation rules are applied to these jobs on the southeastern railroads, *it is usually the Negro firemen who are adversely affected by the rule*" (emphasis supplied).

Thus, whether racially motivated or not, the Brotherhood is bargaining changes in the mileage rules under which it concedes that "it is usually the Negro firemen who are adversely affected." It is difficult to conceive of a more tangible need or a more concrete basis for affording Negro firemen equal political voice and power within their statu-

tory representative than the fact that the statutory power is presently being used to the primary disadvantage of the excluded Negroes. And the fact that the very Negro firemen who are excluded from the bargaining process are the firemen most adversely affected thereby, gives concrete emphasis to petitioners' showing both of the inherent inequality of exclusion and of the discriminatory impact of exclusion.

. . . . . .

The record thus provides this Court with a specific, detailed and unrebutted showing (i) that exclusion from membership results in exclusion from voice, vote and every phase of participation in the statutory bargaining process; (ii) that exclusion from membership results in actual discrimination through hostility, nonrepresentation and misrepresentation; and (iii) that the current bargaining objectives of the Brotherhood, whether racially motivated or not, primarily disadvantage excluded Negro firemen. This would appear to be not only an *ample* but an *optimum* context for a decision by this Court on the statutory and constitutional issues flowing from both the inherent inequality of exclusion and the actual discriminatory results of exclusion.

We turn now to demonstrate that this unrebutted record of inherent and actual inequality in the statutory bargaining process remains unimpaired; nothing in the opinions below could have, or has, rendered "abstract" the very real, tangible and concrete record of racial inequality which cries out for the remedial hand of this Court.

II

Nothing in the Opinions Below Renders Abstract Rather than Concrete the Issue of Racial Exclusion from the Statutory Bargaining Agent

We have just demonstrated that the record presents the issue of racial exclusion in a concrete not an abstract context. Nothing in either of the opinions below renders this issue any less concrete.

After the trial, the parties filed detailed requests for findings and conclusions of law in accordance with Rule 52(a) (J.A. 2). Instead of making such findings and conclusions, however, the District Judge filed a memorandum opinion (J.A. 298-304) containing certain findings of fact and legal conclusions which he deemed "compliance with Rule 52(a)" (J.A. 304). Apparently the District Judge did not feel called upon to make detailed findings on questions of nonparticipation and of discrimination, for he stated that "the factual questions respecting inequality, discrimination and other related complaints presented in evidence have no bearing upon the single question to be resolved" (J.A. 299) and "the presence or absence of actual unequal treatment by the representative is immaterial" (R. 302). What rendered the factual questions concerning unequal treatment and discrimination "immaterial" in the District Judge's mind was his belief that the union was a "private association" and a "voluntary organization" which was not subject to statutory or constitutional limitations of fair play (J.A. 303).

But even though the District Judge found it unnecessary to go into detail on the factual issues of nonparticipation and discrimination because his view of the law rendered such proof immaterial, he nevertheless made clear his own views on these factual issues. He assumed (R. 300), and

of course he could not have done otherwise in view of the Brotherhood's admissions, that Negro firemen are denied any participation whatever in the statutory bargaining process. He found, in so many words, that "the evidence presented establishes the fact that these plaintiffs and the members of their class *are discriminated against in respect of their representation* and participation; *their condition of employment*, and other matters relating to such employment" (R. 300); and, to the same effect, he expressly accepted petitioners' "showing of *actual discriminatory representation* by the Brotherhood" (R. 301) (emphasis supplied). Finally, he assumed, and again he could not have done otherwise in view of the Brotherhood's admissions, that Negro firemen are the principal losers from the Brotherhood's major bargaining objectives in spreading the work (J.A. 298-299), although he was unwilling to "state definitely that this Brotherhood adopted these practices *for the purpose of* discriminating against the Negroes" (J.A. 299) (emphasis supplied). Thus, the only and extremely limited factual determination which the District Court made against the petitioners was that, with respect to the Brotherhood's admitted bargaining objective in spreading the work, the Court was unable to "state definitely" that it was racially motivated.

In sum, the posture of the case as it left the District Court was as follows:

(a) The petitioners' undisputed proof that exclusion from membership resulted in complete nonparticipation in the statutory bargaining process (Point I A, *supra*)—i.e., inherent inequality—was assumed by the District Court.

(b) The petitioners' unrebutted proof of hostility, misrepresentation, nonrepresentation and discrimination (Point I B, *supra*)—i.e., of actual inequality

—was found as a fact in so many words by the District Court.

(c) The petitioners' proof, conceded by the Brotherhood, that Negro firemen are primary losers under the Brotherhood's major bargaining objective of spreading the work (Point I C, *supra*) was assumed by the District Court.

The two-judge per curiam opinion of the Court of Appeals likewise accepts petitioners' showing of nonparticipation in the bargaining process, for it recites at the outset that "a Negro fireman cannot become a member of the Brotherhood under existing provisions of the Brotherhood's Constitution, nor may any firemen who are not members of the Brotherhood attend meetings of its local lodges" (Petition, p. 24). But, on the issue of discriminatory representation as distinguished from nonparticipation, the court below misread the District Court's opinion. What it did (see Petition, p. 26) was to treat the District Court's inability to "state definitely" that the spread-the-work bargaining objective of the Brotherhood was "for the purpose of discriminating against the Negroes" as if the District Judge had "decided the facts pertaining to discrimination adversely to the contention of appellants" (Petition, p. 26). In other words, the Court of Appeals mistook the District Court's limited finding that the spread-the-work objective of the Brotherhood was not racially motivated, for the broader finding that there had been no actual discrimination whatever and did this *in the face of the specific recitals by the District Court that such actual discrimination had been shown* (see p. 14, *supra*). The court below, by quoting the limited adverse holding by the District Judge on the question of racial motivation for the Brotherhood's spread-the-work objective, and by failing to quote or even mention the District Judge's affirmative findings on

actual discriminatory representation, gave the District Court's opinion an interpretation directly opposite to that expressly stated by the District Court.

It was this misunderstanding of the District Court's opinion that led the court below (Petition, p. 28) to state that "the issue of actual discrimination by the Brotherhood" had been "subtracted from the issue by the findings of the district judge." Quite possibly it is this sentence which caused this Court to conclude that there was something "abstract" about the record. We respectfully submit that this misstatement by the Court of Appeals can not render abstract what we have been at such pains to show is in fact a concrete record of discrimination. The District Judge found and, on the admitted facts had no choice but to find, actual discrimination in the representation which excluded Negro firemen are receiving from their statutory bargaining agent. The Court of Appeals' misreading of the District Judge's opinion cannot alter the state of the record adduced before and recognized by him.

Moreover, even if this Court should, contrary to the showing just made, believe that the court below correctly read the District Court opinion when it said that the "issue of actual discrimination" had been "subtracted from the issue by the findings of the district judge," this would by no means place the questions presented in an "abstract context". Let us assume—contrary, we submit, to the record and to the opinions below—that both the District Court and the Court of Appeals found that there had been no actual discrimination by the Brotherhood and as a result the "two-court rule" (see, e.g., *Page* v. *Rogers*, 211 U.S. 575, 577) excludes this issue from the consideration of this Court. Even in this circumstance, however, there would nonetheless be presented to the Court the extremely concrete issue of inherent inequality based upon the detailed

factual account of deprivation of participation in the statutory bargaining process extracted from the Brotherhood in the course of this litigation. The issue whether racial exclusion in the exercise of statutory bargaining power renders excluded Negroes "inherently unequal" is no more abstract than the issue presented in *Brown* v. *Board of Education*, 347 U.S. 483. Indeed, as this Court pointed out in *Brown* (at pp. 488, 492), it was precisely because the lower courts had found equality in school facilities (i.e., that the issue of actual discrimination had been subtracted from the cases) that the Court was required to decide the question of inherent inequality. This Court made clear in *Brown* that it is *only* when no immediate inequality in tangible matters is presented that it will decide the "abstract" issue of racial segregation; to imply that this Court will not decide the question of inherent inequality in the statutory bargaining process in the absence of findings below of actual discrimination is to say that it will never decide that question, for the presence of such findings of discrimination will always render decision of the general (i.e., inherent inequality) question unnecessary.

To reduce the existing situation to its simplest terms, either the court below was wrong or it was right and in either event the questions presented are in a concrete rather than an abstract context. If the court below was *wrong*, as we confidently assert, and the issue of actual discrimination in the day-to-day bargaining could not be and has not been subtracted from the case, then obviously this Court has an appropriate record before it for deciding the vital questions presented in a context of both actual discrimination and inherent inequality. If, on the other hand, the court below was *right* and the issue of actual discrimination has been subtracted from the case, the question of inherent inequality is nonetheless presented to the

Court in the concrete context of detailed facts on nonparticipation and in the only form in which it can ever be decided, namely, after the issue of discrimination has been removed from the case. While a determination whether the court below was right or wrong may have some effect on the questions that would be before the Court, it does not have any effect upon the nature of the record which is concrete, specific and detailed in either event.

III

Since the Questions Are Presented by this Record in a Concrete Rather than in an Abstract Context, the Appropriate Course Is Either to Review the Case or to Remand for Clarification

There are three alternative approaches to petitioners' case in its present posture before this Court:

1. If petitioners are correct—as we confidently assert—in urging that the showing of actual discrimination has not been impaired by the decision of the court below, the questions presented are before this Court in the most concrete manner possible. If this Court, on reconsideration, now agrees with petitioners on this point, the appropriate remedy—the questions presented being of obvious and admitted importance—would be to grant the petition for rehearing, issue the writ of certiorari and review the case.

2. If petitioners are incorrect and the decision of the court below could and did substract the issue of actual discrimination from the case, the question of inherent inequality is nevertheless presented for decision in the most concrete fashion in which that issue can ever be presented. In this event, too, the appropriate remedy—the questions presented being of obvious and admitted importance—

would be to grant the petition for rehearing, issue the writ of certiorari and review the case.

3. There is the likelihood, however, as we indicated at the outset of this Petition for Rehearing (p. 2, *supra*), that what the Court took for *abstraction* was the *confusion* in the decision below and that the Court's real difficulty is that it cannot determine whether the issue of actual discrimination has in fact been subtracted from this case. We respectfully suggest, however, that petitioners ought not be penalized for the confusion in the decision below. Rather, if what is troubling this Court is the fact that it cannot determine whether the issue of actual discrimination has been subtracted from the case, *the appropriate remedy would be to remand to the court below for the clarification of its opinion or to the District Court for more specific findings of fact upon which the Court of Appeals could base its clarification.*

Indeed, in circumstances similar to those presented herein, without deciding the merits this Court has remanded for appropriate clarification of the facts. Its practice in this regard is reviewed, with pertinent citations, in *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 373:

> "It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points."

Particularly where questions of constitutional or general public importance have hinged on facts not determined or announced with sufficient clarity by the lower courts, this Court has remanded for the necessary clarifying action. See, e.g., *City of Hammond* v. *Schappi Bus Line*, 275 U.S.

169; *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194; *Chastleton Corp.* v. *Sinclair*, 264 U.S. 543; *Interstate Circuit* v. *United States*, 304 U.S. 55; *Chicago, Milwaukee & St. Paul R'way* v. *Tompkins*, 176 U.S. 167.[8] These precedents are especially applicable here where the questions presented are of such vital public importance, the injustice of the decision below so great, and the effect of denying review so final.[9]

Conclusion

The record which petitioners built in the District Court was as detailed, as specific and as concrete as any that will ever come before this Court on the concededly important issues here presented. The record contains the detailed admissions of the Brotherhood as to the complete exclu-

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[8] *Cf.* dissenting opinions of Mr. Justice Frankfurter in *Hood & Sons* v. *DuMond*, 336 U.S. 525 at 574; *Zorach* v. *Clauson*, 343 U.S. 306 at 322; and see Note, 49 Harv. L. Rev. 631, "The Presentation of Facts Underlying the Constitutionality of Statutes."

[9] There is an additional and compelling reason for this Court to adopt one of the three above alternatives rather than to leave this case in its present posture: The Court's stated ground for denial of certiorari creates a very real two-fold uncertainty as to this Court's future disposition of racial exclusion and segregation cases. First, this Court's characterization as "abstract" of a record of discrimination as "concrete" as humanly possible will doubtless be effectively pressed upon lower courts as grounds for abstention in identical or analogous racial situations wholly unintended by this Court. Second, the Court's refusal to review the issue of inherent inequality, when contrasted with its action in reviewing that very issue in *Brown* and subsequent cases (see pp. 16 to 18, *supra*), can only create confusion in the lower courts in numerous racial exclusion and segregation cases. In an area of litigation already fraught with major difficulties, it becomes doubly important that this Court, if it intends to apply as-yet unstated justiciability requirements, provide sufficiently detailed guidance to avoid confusion and uncertainty in their application. Whatever may have been the reason for this Court announcing its grounds for denial of review and whatever may have been intended by the words "abstract context", it is submitted that only a full review of the record and an elaboration of this Court's difficulties therewith, if any should remain after such a review, will provide others with the guidance necessary to avoid fatal pitfalls in this critical area of constitutional litigation.

sion of Negro firemen from the statutory bargaining process, admissions carefully extracted from the Brotherhood on every facet of nonparticipation. It contains detailed and unrebutted evidence of actual day-to-day discrimination by the bargaining agent. It contains detailed and unrebutted proof that the major bargaining objectives of the Brotherhood primarily disadvantage the excluded Negro firemen. We respectfully submit that, on such proof, any confusion in the decision of the court below ought not penalize the petitioners and their class—elderly Negro firemen whose last chance for first class citizenship rests on this petition.

It is respectfully submitted that the petition for rehearing should be granted, the writ of certiorari issued, and the questions raised reviewed by this Court. If, however, the Court should desire clarification of the decision of the court below, it is respectfully submitted that the appropriate remedy is remand for purposes of such clarification.

Respectfully submitted,

JOSEPH L. RAUH, JR.,
JOHN SILARD,
Attorneys for Petitioners,
1631 K Street, N. W.,
Washington 6, D. C.

Certificate

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and that it is restricted to the grounds specified by Rule 58 of this Court.

JOSEPH L. RAUH, JR.